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No. 80-1771

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

HYDROLEVEL CORPORATION,
Petitioner,

v.

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,
Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT

The *Brief in Opposition To Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit,* filed by respondent The American Society of Mechanical Engineers ("ASME Brief"), makes two points that require comment.

First, the ASME Brief expressly argues, *for the first time in this litigation,* that the June 9, 1972, ASME letter to petitioner Hydrolevel Corporation ("Hydrolevel") constituted "a complete withdrawal" from the conspiracy to monopolize, a conspiracy which the ASME concedes had the purpose and effect of destroying Hydrolevel. (ASME Brief at p. 3). The ASME thus recognizes that the Court of Appeals' opinion, which created a new conspiracy defense of "retraction," is not legally supportable. Instead, the ASME now tries to fit its June 1972 letter, and the Court of Appeals' ruling on the issue of damages, into the well-known doctrine of "withdrawal." As pointed out at

pages 12-13 of Hydrolevel's Petition, there is absolutely no way that the ASME letter can meet the strict legal standards of "withdrawal" under long-standing and direct holdings of this Court and, in any event, the invokation of that defense would have had to be *pleaded* (which it was not) and presented to the jury as a factual issue (which it was not). Such a revolutionary rewriting of the precedents established by this Court should not be left unreviewed.

A second point made by the ASME Brief deserves mention. Attempting to push the Second Circuit's new "retraction" theory out of the limelight, the ASME characterizes the "real basis" for the Court of Appeals' reversal of the jury's damage award as "that there simply was no credible or relevant evidence to support the" damage award. (ASME Brief at p. 1). Matters of credibility, of course, are for the jury to resolve, not the Court of Appeals. Moreover, the ASME neglects to point out that it has *never* before challenged the relevance of Hydrolevel's damage evidence. Indeed, *the ASME did not object to its admissibility at trial* and *the ASME's own expert confirmed its reasonableness.* That a Court of Appeals, under these circumstances, can conclude that Hydrolevel's damage estimates were "open to serious question" and, on that basis, reverse a well considered jury award, is directly contrary to this Court's holding in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

After the filing of Hydrolevel's Petition on April 22, 1981, this Court rendered its opinion in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 49 U.S.L.W. 4537 (May 26, 1981), a case that was referred to at page 10 of Hydrolevel's Petition. The Court's opinion in that case fully supports the position taken by Hydrolevel in the Courts below and in this Petition.

> The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers. The absence of any reference to contribution in the legislative history or of any possibility that Congress was concerned with softening the blow on joint wrongdoers in this setting makes examination of other

> factors unnecessary. We therefore conclude that Congress neither expressly nor implicitly intended to create a right to contribution. If any right to contribution exists, its source must be federal common law.

Id. at 4540 (citations and footnotes omitted). The Court of Appeals in the instant case has attempted to fashion a new doctrine of federal common law that would permit a participant in a conspiracy to monopolize to limit its liability for the ensuing damage by issuing a letter which does not fit within the settled law pertaining to withdrawals from a conspiracy. Whether such a new doctrine is denominated "retraction," "withdrawal," or "contribution," it amounts to the same thing: a startling new concept in the law of antitrust conspiracy which deserves the attention of this Court.

CONCLUSION

For these reasons, as well as those set forth in the Petition, Hydrolevel's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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